

The record as specifically set forth in the award of the administrative law judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the award of the administrative law judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability if any?
- (2) Did claimant suffer an intervening injury subsequent to his employment with the respondent which would negate claimant's right to an award against the respondent, E.W. Johnson, Inc.?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and in addition the stipulations of the parties, it is found as follows:

(1) The claimant, Garland E. Cook, sustained personal injury by accident arising out of and in the course of his employment while working for the respondent E.W. Johnson, Inc., suffering a ten percent (10%) permanent partial general work disability from the date of accident through the date he was last employed on April 22, 1993. Thereafter, claimant suffered a 33.5 percent permanent partial general work disability as a result of his injury suffered while employed with the respondent.

Claimant, a 52 year old, married, construction worker was injured on January 5, 1990 when a 25-foot long I-beam which claimant was cutting with a torch pulled free, injuring claimant's back. Claimant was ultimately referred to Dr. Myron Zeller who referred him to Dr. William Shapiro in Wichita, Kansas. Dr. Shapiro suggested a series of spinal blocks. Claimant requested a second opinion, and was referred to Dr. C. Reiff Brown of Great Bend, Kansas, who prescribed physical therapy. The physical therapy improved claimant to the point where he was capable of returning on May 10, 1990 with Builders Plus in Garden City, Kansas. Within a few days claimant again began experiencing back pains which gradually became worse, ultimately reaching the level experienced by claimant following the original injury. Claimant was returned to Dr. C. Reiff Brown who again prescribed physical therapy which, this time, failed. Spinal injections also proved of no benefit and Dr. Brown recommended surgery.

On August 6, 1990, Dr. Brown performed a laminectomy and discectomy followed by a spinal fusion at L5-S1.

Subsequent to his original treatment in April, 1990 claimant returned to work with no restrictions per the medical reports of Dr. Brown. Claimant testified that, while the reports of Dr. Brown showed no restrictions, he was in fact restricted by Dr. Brown, having received verbal limitations during his last examination with Dr. Brown prior to his return to work in May. This allegation by claimant is supported by the testimony of Dr. Brown who admitted that the restrictions were not reduced to writing as they would have interfered with claimant's ability to obtain reemployment.

Prior to his return to work in May claimant underwent an MRI which showed a small herniation at the L5-S1 level. At the time of the surgery Dr. Brown found the herniation at L5-S1 to have increased somewhat over that observed on the MRI. Dr. Brown agreed that,

upon return to work in May, 1990 claimant became more symptomatic as a result of the work activities. The doctor also opined this return of the symptoms did not necessarily have to stem from a trauma. It is fairly common for an asymptomatic individual to have a reoccurrence of symptoms, following a resumption of physical activities.

As the result of the back surgery, with residual effects, Dr. Brown opined claimant suffered a twelve percent (12%) permanent partial impairment of the body as a whole on a functional basis. Dr. Brown also returned claimant to work permanently restricting him from single lifts over one hundred (100) pounds, with a fifty pound (50) limit on frequent lifting. Dr. Brown advised that claimant use proper body mechanics when doing any lifting.

Subsequent to his recovery from the surgery, claimant returned to work for Scott and Associates, formerly known as E.W. Johnson, Inc. Mr. Sheldon Showalter, general partner in Scott and Associates was a long time friend of the claimant and hired claimant back to work knowing his limitations, on a temporary basis, because claimant was his friend and needed to be able to pay his bills. His temporary employment began July 3, 1991 and terminated April 22, 1993.

During this period of employment with Scott and Associates claimant was working in an accommodated position, with Mr. Showalter providing additional labor to assist claimant with all the heavy lifting, i.e., anything over fifty (50) pounds. Claimant was employed at a comparable wage earning \$8.50 per hour, which is the same hourly wage he was making at the time of his January 5, 1990 date of injury.

Dr. Brown, in placing the final restrictions upon the claimant, advised that claimant use proper body mechanics anytime lifting is involved. Both claimant and Mr. Showalter, agreed that, in this particular field of construction, using proper body mechanics during lifting is extremely difficult and at times impossible. The loads lifted in this industry have a tendency to be bulky and the work positions many times prevent lifters from kneeling or properly bending their legs while lifting. This employment also requires altitude work sometimes on ladders, scaffolds, platforms, etc. which also restricts ones ability to use proper body mechanics. All of the these factors contribute to the claimant's limited ability to return to work in the cement construction field.

Claimant was evaluated by Ms. Karen Crist Terrill on January 27, 1993. Ms. Terrill felt that claimant had a labor market access loss of twenty-three percent (23%) when considering the Finney County, Kansas market. However, this labor market access information improperly utilized certain restrictions provided to claimant by Dr. Brown which were temporary in nature. When Ms. Terrill was provided the August 30, 1991 final restrictions from Dr. Brown she opined that claimant would have a ten percent (10%) loss of access to the open labor market. At the time of the evaluation claimant was still working for Scott and Associates at a comparable wage thus experiencing a zero percent (0%) loss of wage earning capacity. Ms. Terrill did opine that if claimant lost his job with Scott and Associates he would suffer a fifty-seven percent (57%) loss of wage earning capacity. In reaching her opinion Ms. Terrill opined claimant was capable of functioning in the medium category of the Dictionary of Occupational Titles which allows a fifty (50) pound maximum lift.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

" 'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award of compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. Brown, the authorized treating physician, assessed claimant a twelve percent (12%) permanent partial impairment to the body as a whole on a functional basis subsequent to the surgery. Dr. Brown did not, in his testimony, relate this twelve percent (12%) functional impairment back to the condition suffered by claimant subsequent to his January 5, 1990 injury. The Appeals Board believes the situation encountered by claimant with Builders Plus and the increased herniation suffered thereafter was a direct and natural consequence of the original injury in January, 1990 while working for E.W. Johnson, Inc. but the functional impairment rating of Dr. Brown cannot be applied until after the August 6, 1990 surgery.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the gross weekly wage that the employee was earning at the time of the injury."

Claimant in this case has overcome the presumption of K.S.A. 44-510e and has proven that he suffered a work disability even after returning to re-employment at a comparable wage. Claimant argues effectively that this return to employment with Scott and Associates was a temporary accommodation extended to an old friend. The Appeals Board finds the testimony of Mr. Showalter to be credible regarding the limitations experienced by claimant and the necessity for assistance with certain types of lifting. The testimony of both claimant and Mr. Showalter is significant in indicating the difficulty one

would encounter in attempting to apply Dr. Brown's limitation that all lifting be done with "proper body mechanics".

The Appeals Board finds that claimant returned to work at a comparable wage thus experiencing no loss of wage earning capacity until April 22, 1993. The Appeals Board finds that a ten percent (10%) loss of ability to work in the open labor market would be appropriate through the period of April 22, 1993 when claimant was laid off by Scott & Associates. The Appeals Board further finds that, subsequent to the layoff, claimant experienced a fifty-seven percent (57%) loss of ability to earn a comparable wage based upon the testimony of Ms. Karen Crist Terrill taking into consideration the claimant's past education, training, experience and physical limitations. See Scharfe v. Kansas State University, 18 Kan. App. 2d 103, 108, 848 P.2d 994 (1992). The Appeals Board, in combining the fifty-seven percent (57%) loss of ability to earn a comparable wage with the ten percent (10%) loss of access to the open labor market finds claimant has suffered a thirty three and one half percent (33.5%) permanent partial general work disability subsequent to April 22, 1993. The formula contained in Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990) which gives equal weight to each factor in computing claimant's work disability is deemed appropriate under the particular facts and circumstances of this case and is utilized by the Appeals Board in this matter.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the award of Special Administrative Law Judge William F. Morrissey dated January 21, 1994, is hereby modified and an award is entered as follows:

Claimant is awarded compensation against respondent E.W. Johnson, Inc., and its insurance carrier, Builders Association Self Insurance Fund for an accidental injury sustained on January 5, 1990. Claimant is entitled to 60.43 weeks temporary total disability at the rate of \$266.68 per week in the sum of \$16,115.47 followed by 111.57 weeks permanent partial general bodily work disability at the rate of \$26.69 per week in the sum of \$2,977.80 followed thereafter by 234 weeks permanent partial general body work disability at the rate of \$89.34 per week in the sum of \$20,905.05 for a total award of \$39,998.32.

As of June 17, 1994, there is due and owing to claimant 60.43 weeks of temporary total disability compensation at the rate of \$266.68 per week in the sum of \$16,115.47 plus 111.57 weeks permanent partial general body work disability at the rate of \$26.69 per week in the sum of \$2,977.80, followed thereafter by 60.14 weeks permanent partial general body work disability at the rate of \$89.34 per week in the sum of \$5,372.90 for a total of \$24,463.60 which is due in one lump sum minus any amounts previously paid. Claimant is thereafter entitled to 182.86 weeks permanent partial general bodily work disability at the \$89.34 per week in the sum of \$16,336.71 until fully paid or until further order of the Director.

In all other respects not contrary to this award, the January 21, 1994 award of Special Administrative Law Judge William F. Morrissey is affirmed.

Claimant is entitled to future medical treatment compromising routine maintenance care by the respondent without need for further application. Should claimant require treatment beyond routine maintenance care, proper application to and approval by the

Director of Workers Compensation would be necessary.

Claimant should be referred for an assessment as to whether claimant would benefit from vocational rehabilitation.

Claimant is awarded unauthorized medical up to \$350.00 upon presentation of an itemized statement.

Claimant's contract of employment with his attorney is approved subject to the limitations of K.S.A. 44-536.

Fees and expenses of the administration of the Kansas Workers Compensation Act are accessed against the respondent and the insurance carrier and the Kansas Workers Compensation Fund pursuant to the agreement that the Kansas Workers Compensation Fund will be responsible for twenty five percent (25%) of all compensation, medical and experience with the respondent and insurance carrier being responsible for seventy five percent (75%) of all compensation, medical expenses and costs in the claim to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$209.00
CRS Court Reporting Service Deposition of Karen Crist Terrill	\$272.10
Underwood & Shane Deposition of C. Reiff Brown, M.D.	\$361.00
Tri-State Reporting Service Deposition of Sheldon Showalter	\$214.56

IT IS SO ORDERED.

Dated this ____ day of June, 1994.

BOARD MEMBER

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BOARD MEMBER

cc: Mark E. McFarland, Attorney for Claimant, PO Box 497, Garden City, KS 67846
Wade A. Dorothy, Attorney for Respondent, PO Box 14548, Lenexa, KS 66285
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William F. Morrissey, Special Administrative Law Judge
George Gomez, Director